

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEONARD A. HASKIN, ) No. C 08-2226 CW (PR)  
)  
Plaintiff, ) ORDER DISMISSING WITHOUT  
) PREJUDICE ALL CLAIMS AGAINST  
v. ) DEFENDANT CAPOZOLI; AND GRANTING  
) REMAINING DEFENDANTS' MOTION TO  
ROBERT AYERS, JR., et al., ) DISMISS  
)  
Defendants. ) (Docket no. 32)  
\_\_\_\_\_)

INTRODUCTION

Plaintiff Leonard A. Haskin<sup>1</sup> filed this pro se civil rights action under 42 U.S.C. § 1983 on July 28, 2008, when he was a state prisoner incarcerated at San Quentin State Prison (SQSP).

In an Order dated December 31, 2009, the Court found cognizable Plaintiff's Eighth Amendment claim of deliberate indifference to serious medical needs against the following SQSP Defendants: Warden Robert Ayers, Jr.; Chief Physician Dr. Williams; Physicians Dr. Martin, Dr. Wilson, Dr. Bui and Dr. Udenyi; Neurologists Dr. Capozoli and Dr. Mendius; Urologist Dr. Gershbein; Sergeant Nguyen; and Correctional Officer Perry.

On March 23, 2010, Defendants Ayers, Bui, Gershbein, Martin, Nguyen, Perry, Udenyi, Williams and Wilson (Defendants) moved to dismiss Plaintiff's deliberate indifference claim for failure to exhaust administrative remedies.<sup>2</sup> Inmate Appeals Branch Chief D.

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<sup>1</sup> Plaintiff's last name was previously incorrectly spelled as "Haskins." The correct spelling is "Haskin."

<sup>2</sup> Defendants Mendius and Capozoli were never served in this action; therefore, they have not joined the other Defendants in the present motion. On January 25, 2011, the Court dismissed without prejudice Plaintiff's claims against Defendant Mendius under Federal Rule of Civil Procedure 4(m). Meanwhile, in an Order dated March 1, 2011, the Court directed Plaintiff to provide a current address for Defendant Capozoli within fourteen days. The fourteen-day deadline has passed, and Plaintiff has not

1 Foston and Deputy Attorney General C. Young submitted declarations  
2 in support of Defendants' motion to dismiss. Plaintiff filed  
3 three letters -- on August 13, 2010, October 7, 2010 and January  
4 3, 2011 -- in response to Defendants' motion to dismiss.<sup>3</sup>  
5 Defendants filed a reply to Plaintiff's letters.

6 On February 1, 2011, the Court directed Defendants to produce  
7 supporting documents relevant to 602 inmate appeal log no.  
8 07-00209. On February 8, 2011, Defendants responded to the  
9 Court's February 1, 2011 Order. SQSP Appeals Coordinator L. Rojas  
10 submitted another declaration in support of Defendants' motion to  
11 dismiss. On March 1, 2011, Plaintiff filed a reply to Defendants'  
12 response.

13 For the reasons discussed below, the Court GRANTS Defendants'  
14 motion to dismiss.

#### 15 BACKGROUND

16 Plaintiff alleges that Defendants "neglect[ed] to  
17 appropriately acknowledge or treat" his serious medical needs on  
18

19  
20  
21 \_\_\_\_\_  
22 responded to the Court's March 1, 2011 Order. Accordingly,  
23 Plaintiff's claims against Defendant Capozoli are also DISMISSED  
without prejudice under Rule 4(m).

24 <sup>3</sup> In addition to opposing the motion to dismiss, Plaintiff  
25 alleges in these letters that his sentence is illegal. (Pl.'s  
26 Aug. 13, 2010 Letter at 2 (citing Cunningham v. California, 549  
27 U.S. 270 (2007)).) However, contrary to Plaintiff's allegation  
28 that this is an "important matter regarding this law suit  
involving San Quentin," his sentencing claim need not be addressed  
at this time because it is not relevant to his deliberate  
indifference claims. Instead, if Plaintiff wishes to pursue this  
claim, he should file a separate habeas corpus action after  
exhausting his state court remedies.

1 several occasions between 2003 and 2008. (Am. Compl. at 5.<sup>4</sup>) The  
2 amended complaint refers to Plaintiff's multiple medical problems;  
3 however, for the purposes of analyzing the exhaustion issue, the  
4 Court has divided his problems into the following categories:

5 I. Lack of Treatment for Urological Problems

6 Plaintiff alleges that between December 2, 2004 and  
7 approximately March 1, 2005, he "complained" to Defendants Wilson  
8 and Bui "of urological problems, and neither Dr. ordered any  
9 treatment." (Id. at 6.)

10 On December 2, 2004, Plaintiff was examined by Dr. Williams,  
11 who indicated that "he would be sending [Plaintiff] to urology,  
12 but never followed through with the appointment." (Id. at 7.)

13 On or about April 1, 2005, Defendant Bui ordered antibiotics  
14 for Plaintiff's "enlarged prostate [sic];" however, the  
15 medication "did not work." (Id. at 6.)

16 On April 22, 2005, Plaintiff saw Defendant Gershbein, who  
17 prescribed Plaintiff "seven days of Valium" and informed Plaintiff  
18 that his symptoms were "psychosomatic." (Id. at 8.) Plaintiff  
19 "continued to complain to H-Unit Doctors until [he was] prescribed  
20 Flomax." (Id.)

21 On July 14, 2006, Plaintiff was examined by an SQSP  
22 urologist.<sup>5</sup>

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24 <sup>4</sup> Plaintiff has not numbered his amended complaint. Although  
25 he has numbered the pages of the attached exhibits, the pages are  
26 not in numerical order. Therefore, the Court has renumbered his  
amended complaint and exhibits, beginning with page one as the  
first page of the complaint form.

27 <sup>5</sup> After a "minimal case review" during the July 14, 2006  
28 appointment, Plaintiff alleges he was not examined by a urologist  
"until approximately December 12, 2008." (Am. Compl. at 9.)

1 On or about September 1, 2007, Plaintiff was examined by SQSP  
2 urology specialist Dr. Brown.

3 On October 16, 2007, Plaintiff received prostate surgery.

4 On October 17, 2007, Plaintiff was "discharged . . . with no  
5 follow-up treatment or pain medications ordered by Dr. Brown."  
6 (Id.)

7 On October 18, 2007, Plaintiff was transported to the Trauma  
8 Treatment Area-Emergency Room (TTA) because he was "in severe  
9 pain." (Id.) Plaintiff "received pain medication and  
10 antibiotics, and a follow-up treatment, which included cleaning  
11 [his] exterior catheter."

12 On October 19, 2007, Plaintiff was seen by Defendant Udenyi,  
13 who allegedly exclaimed to Plaintiff, "'Oh my God, your catheter  
14 was supposed to be removed in 48 hours. Jesus, we're a day late  
15 already . . . ." (Id.) Defendant Udenyi then directed the  
16 registered nurse to send Plaintiff immediately to TTA to remove  
17 the catheter. (Id.) Soon after, a TTA doctor removed Plaintiff's  
18 catheter.

19 On or about October 21, 2007, Plaintiff "began suffering  
20 complications" from his prostate surgery, which he alleges caused  
21 "acute pain" in his prostate area, problems with "urinary  
22 retention" and "burning" while urinating. (Id. at 11.)

23  
24 On November 20, 2007, Plaintiff returned to TTA because he  
25 was "in severe pain from said complications." (Id.) He was  
26 allegedly "refused said treatment." (Id.)

27  
28 However, this is contradicted by the record, which shows that  
Plaintiff was examined by urology specialists in September, 2007.

1 On or about December 10, 2007, Defendant Udenyi told  
2 Plaintiff that "all of Dr. Brown's treatment orders of November  
3 20, 2007 were lost out of [his] medical file." (Id.) Defendant  
4 Udenyi then indicated she would "call Dr. Brown, and ask him what  
5 treatment he prescribed." (Id.) Defendant Udenyi later  
6 prescribed Plaintiff one milligram of Terazosin once daily.  
7 Plaintiff alleges that "this dosage did nothing for my pain or  
8 systems [sic]." (Id. at 12.) Thereafter, Defendant Udenyi  
9 increased Plaintiff's medication dosage.

10 II. Lack of Treatment for Dehydration<sup>6</sup>

11 On December 24, 2006, Plaintiff alleges that at around 7:00  
12 p.m. he "began to vomit every 30 minutes." (Id. at 13.) At  
13 around 1:00 a.m., Plaintiff approached Defendant Perry and  
14 requested "immediate medical treatment," which was denied. (Id.)  
15 At around 3:00 a.m., Plaintiff again approached Defendant Perry  
16 and requested immediate medical treatment, which was denied.  
17 (Id.) At 5:20 a.m., Plaintiff once more approached Defendant  
18 Perry, who this time "wrote [him] a pass" to go to TTA. (Id.)  
19 Plaintiff alleges the TTA registered nurse informed Plaintiff that  
20 if he had "not come in when [he] did, that [he] would have died of  
21 dehydration." (Id.)

22  
23 On January 1, 2007, Plaintiff submitted 602 inmate appeal log  
24 no. SQ-07-00209, requesting that the December 24, 2006 incident  
25 "be immediately put under investigation." (Id. at 44.)

26 On January 2, 2007, Plaintiff also submitted a copy of appeal

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27  
28 <sup>6</sup> Although it is not clearly indicated in the record, the  
Court assumes that Plaintiff's dehydration was related to his  
urological problems.

1 log no. SQ-07-00209 to Chief Medical Officer K. Saylor and Federal  
2 Receiver R. Sillen.

3 On January 17, 2007, Plaintiff received notification that  
4 appeal log no. SQ-07-00209 had been assigned to a reviewer at the  
5 first formal level. (Id. at 61.)

6 On March 6, 2007, Plaintiff wrote a letter indicating that he  
7 had not yet received a response from the first formal level of  
8 review, which had a due date of February 27, 2009. (Id. at 55.)

9 On March 1, 2007, appeal log no. SQ-07-00209 was "partially  
10 granted" at the first formal level of review because an "inquiry  
11 into [Plaintiff's] allegation had been conducted." (Rojas Decl.,  
12 Ex. A at AGO-09.) Plaintiff then submitted his appeal to the  
13 second formal level of review.

14 On March 14, 2007, Plaintiff received notification that  
15 appeal log no. SQ-07-00209 had been assigned to a reviewer at the  
16 second formal level. (Am. Compl. at 62.)

17 The record originally did not contain a copy of the response  
18 to his appeal to the second formal level of review or any  
19 indication about whether the appeal progressed to the Director's  
20 level of review. Therefore, in its February 1, 2011 Order the  
21 Court directed Defendants to provide the Court with "any and all  
22 relevant supporting documents showing whether there was a second  
23 level response to inmate appeal log no. 07-00209, and if so,  
24 whether the appeal progressed to the Director's level." (Feb. 1,  
25 2011 Order at 2.)

26 Defendants submitted a copy of the response from the second  
27 formal level of review, which shows that the reviewer "partially  
28

1 granted" appeal log no. SQ-07-00209 on June 16, 2008. (Rojas  
2 Decl., Ex. A at AGO-18.) The reviewer determined that the inquiry  
3 into Plaintiff's allegation was "complete," and that staff did not  
4 violate California Department of Corrections and Rehabilitation  
5 (CDCR) policy. (Id.) In that response, Plaintiff was instructed  
6 as follows: "If you wish to appeal the decision, you must submit  
7 your staff complaint appeal through all levels of appeal review up  
8 to, and including, the Director's Level of Review. Once a  
9 decision has been rendered at the Director's Level of Review, your  
10 administrative remedies will be considered exhausted." (Id.)

11 In Plaintiff's reply to Defendants' response, he claims that  
12 the copy of the second formal level reviewer's response is  
13 "absolutely fraudulent." (Pl.'s Reply at 1.) However, the Court  
14 finds no evidence to support Plaintiff's allegation. The  
15 documents submitted by Defendants, including the second formal  
16 level reviewer's response, were attached to a declaration by  
17 Appeals Coordinator Rojas, who swore under penalty of perjury that  
18 the copy of appeal log no. SQ-07-00209 and the responses to that  
19 appeal, attached as "Exhibit A," was a "true and correct copy of  
20 the original appeal, the first level review memoranda, and the  
21 second level review memorandum." (Rojas Decl. ¶ 4.)

22 Finally, there is nothing in the record that indicates that  
23 Plaintiff appealed to the Director's level of review. The Court  
24 notes that in his original complaint, filed on a habeas corpus  
25 petition form, Plaintiff alleges that appeal log no. SQ-07-00209  
26 was "not pursued" to the Director's level of review "because of  
27 misdirection" by the "Appeals Coordinator." (Pet. at C-4.)  
28

## 1 III. Lack of Treatment for Spinal Arthritic Disk Degeneration

2 Plaintiff alleges that on October 21, 2003, he learned he had  
3 "Chronic Cervical Lumbar Arthritic Degeneration." (Am. Compl. at  
4 9.) Plaintiff initially requested treatment for his disorder that  
5 day; however, he was informed that he "was beyond physical therapy  
6 until August 13, 2006."<sup>7</sup> (Id.) Plaintiff was referred to  
7 University of California, San Francisco Hospital. Plaintiff was  
8 then referred to SQSP's "medical physical therapist" for "another  
9 probationary period of light traction for Cervical Spine  
10 Disorder." (Id.)

11 On or about October 1, 2004, Plaintiff was seen by Defendant  
12 Wilson for his Spinal Arthritic Disk Degeneration, during which  
13 time Plaintiff told Defendant Wilson "that in addition to the  
14 severe pain and loss of feeling in [his] hands and feet," he was  
15 experiencing pain in his shoulder. (Id. at 6.) Defendant Wilson  
16 referred Plaintiff to a Tele-Ortho Doctor.

17 On April 5, 2007, the "traction probationary period" ended  
18 and the physical therapist referred Plaintiff "back to the  
19 neurosurgeon." (Id.) From April 5, 2007 until approximately  
20 December 17, 2007, Plaintiff alleges he received "no follow-up  
21 treatments." (Id.)

22  
23 DISCUSSION

24 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-  
25 134, 110 Stat. 1321 (1996) (PLRA), amended 42 U.S.C. § 1997e to

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26  
27 <sup>7</sup> Because there is nothing in the record showing that  
28 Plaintiff received any physical therapy during this time, the  
Court assumes that Plaintiff was informed that such therapy was  
unavailable to him until August, 2006.



1 provide that "[n]o action shall be brought with respect to prison  
2 conditions under [42 U.S.C. § 1983], or any other Federal law, by  
3 a prisoner confined in any jail, prison, or other correctional  
4 facility until such administrative remedies as are available are  
5 exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion  
6 requirement is therefore mandatory, and no longer left to the  
7 discretion of the district court. Woodford v. Ngo, 548 U.S. 81,  
8 85 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

9 The PLRA's exhaustion requirement requires "proper exhaustion" of  
10 administrative remedies. Woodford, 548 U.S. at 93. This means  
11 "[p]risoners must now exhaust all 'available' remedies," id. at  
12 85, in "compliance with an agency's deadlines and other critical  
13 procedural rules." Id. at 90-91. The requirement cannot be  
14 satisfied "by filing an untimely or otherwise procedurally  
15 defective administrative grievance or appeal." Id. Further, the  
16 remedies "available" need not meet federal standards, nor need  
17 they be "plain, speedy and effective." Porter v. Nussle, 534 U.S.  
18 516, 524 (2002); Booth, 532 U.S. at 739-40 & n.5.

19 It is the prison's requirements, and not the PLRA, that  
20 define the boundaries of proper exhaustion. Jones v. Bock, 549  
21 U.S. 199, 218 (2007). The CDCR provides its inmates and parolees  
22 the right to appeal administratively "any departmental decision,  
23 action, condition, or policy which they can demonstrate as having  
24 an adverse effect upon their welfare." Cal. Code Regs. Tit. 15,  
25 § 3084.1(a). The CDCR also provides its inmates the right to file  
26 administrative appeals alleging misconduct by correctional  
27 officers. See id. § 3084.1(e). In order to exhaust all available  
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1 administrative remedies within this system, a prisoner must submit  
2 his complaint as a 602 inmate appeal and proceed through several  
3 levels of appeal: (1) informal level grievance filed directly with  
4 any correctional staff member; (2) first formal level appeal filed  
5 with one of the institution's appeal coordinators; (3) second  
6 formal level appeal filed with the institution head or designee;  
7 and (4) third formal level appeal filed with the CDCR director or  
8 designee. Id. § 3084.5; Brodheim v. Cry, 584 F.3d 1262, 1264-65  
9 (9th Cir. 2009); Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D.  
10 Cal. 1997). This satisfies the administrative remedies exhaustion  
11 requirement under § 1997e(a). Barry, 985 F. Supp. at 1237-38.

12 Non-exhaustion under § 1997e(a) is an affirmative defense  
13 which should be brought by defendants in an unenumerated motion to  
14 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.  
15 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

16 Defendants argue Plaintiff has not exhausted all available  
17 administrative remedies for his deliberate indifference claims. A  
18 search of the Inmate Appeals Branch's computer records was  
19 conducted for all appeals filed by Plaintiff, and a computer  
20 print-out of the results was generated. (Foston Decl. ¶ 6.) The  
21 computer print-out comprises "each and every appeal" to the  
22 Director's level of review filed by Plaintiff and "accepted for  
23 review" from 1993 to January 20, 2010 or "screened-out" at the  
24 Director's level of review from 2000 to January 20, 2010. (Id.)  
25 Defendants claim that the Inmate Appeals Branch has no record of  
26 Plaintiff having pursued any appeals relating to his deliberate  
27 indifference claims to the Director's level of review. (Foston  
28

1 Decl. at 6; Ex. A.) Specifically, they argue that he only  
2 submitted two inmate appeals for review at the Director's level of  
3 review, appeal log nos. SQ-07-01305 and SQ-07-02076, and neither  
4 of those appeals involves the deliberate indifference claims found  
5 in his amended complaint. In his letter filed on January 3, 2011,  
6 Plaintiff concedes that these two inmate appeals are "totally  
7 irrelevant to the pending case . . . ." (Pl.'s Jan. 3, 2011  
8 Letter at 1.)

9 The Court now analyzes whether Plaintiff exhausted his  
10 deliberate indifference claims relating to each of his  
11 aforementioned medical problems:

12 I. Lack of Treatment for Urological Problems

13 Plaintiff does not allege, nor does the record indicate, that  
14 he pursued an inmate appeal to the Director's level of review  
15 relating to his claim of lack of treatment for his urological  
16 problems between December 2, 2004 and March 28, 2008. The Court  
17 finds that Plaintiff did not exhaust all administrative remedies  
18 available as to this claim. Accordingly, Defendants' motion to  
19 dismiss is GRANTED as to Plaintiff's deliberate indifference claim  
20 for lack of treatment for urological problems.  
21

22 II. Lack of Treatment for Dehydration

23 As mentioned above, Plaintiff attempted to exhaust his  
24 deliberate indifference claim relating to the lack of treatment  
25 for his dehydration episode on December 24, 2006 by submitting  
26 appeal log no. SQ-07-00209. However, the Inmate Appeals Branch  
27 has no record of Plaintiff having pursued appeal log no. SQ-07-  
28 00209 to the Director's level of review. (Foston Decl. at 6; Ex.

1 A.) Plaintiff does not allege, nor does the record indicate, that  
2 Plaintiff pursued appeal log no. SQ-07-00209 to the Director's  
3 level of review. Instead, Plaintiff argues that the Appeals  
4 Coordinator's Office "deliberately used every means available to  
5 thwart" his pursuit of appeals. (Pl.'s October 7, 2010 letter at  
6 1.) As mentioned above, Plaintiff concedes that appeal log no.  
7 SQ-07-00209 was "not pursued" to the Director's level of review;  
8 however, he holds the "Appeals Coordinator" responsible based on  
9 alleged "misdirection." (Pet. at C-4.) Plaintiff makes  
10 conclusory allegations about the inadequacy of the administrative  
11 grievance process, which is not a sufficient ground to defeat  
12 dismissal of a complaint for failure to exhaust. See White v.  
13 McGinnis, 131 F.3d 593, 595 (6th Cir. 1997). Furthermore, there  
14 is no evidence in the record that prison officials deliberately  
15 lost or failed to honor Plaintiff's appeal log no. SQ-07-00209.  
16 Instead, the record shows Plaintiff failed to utilize the prison's  
17 administrative grievance process properly because he did not  
18 pursue appeal log no. SQ-07-00209 to the Director's level of  
19 review. Because the PLRA's exhaustion requirement requires  
20 "proper exhaustion" of administrative remedies, Woodford, 548 U.S.  
21 at 93, Plaintiff did not satisfy this requirement; he did not  
22 comply with SQSP's procedural rules of pursuing inmate appeals to  
23 the highest level of review.

24 Based on the record, including Plaintiff's statements above,  
25 the Court finds that he has conceded non-exhaustion as to his  
26 deliberate indifference claim for lack of treatment for  
27 dehydration, and has not alleged any exception to the exhaustion  
28 requirement. Accordingly, Defendants' motion to dismiss is

1 GRANTED as to his claim relating to the lack of treatment for his  
2 dehydration.

3 III. Lack of Treatment for Spinal Arthritic Disk Degeneration

4 Plaintiff does not allege, nor does the record indicate, that  
5 Plaintiff pursued a 602 inmate appeal to the Director's level of  
6 review relating his claim of lack of treatment for his Spinal  
7 Arthritic Disk Degeneration problems between December 2, 2004 and  
8 March 28, 2008. Accordingly, the Court GRANTS Defendants' motion  
9 to dismiss on this issue because Plaintiff did not exhaust all  
10 administrative remedies available as to this claim.

11 CONCLUSION

12 For the foregoing reasons,

13  
14 1. The Court DISMISSES without prejudice Plaintiff's claims  
15 against Defendant Capozoli under Federal Rule of Civil Procedure  
16 4(m). As mentioned above, Plaintiff's claims against Defendant  
17 Mendius have previously been dismissed without prejudice under  
18 Rule 4(m).

19 2. The Court GRANTS the remaining Defendants' motion to  
20 dismiss Plaintiff's Eighth Amendment claims of deliberate  
21 indifference as unexhausted. This dismissal is without prejudice.

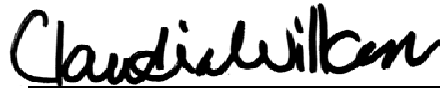
22 3. The Clerk of the Court shall enter judgment in  
23 accordance with this Order, terminate all pending motions, and  
24 close the file.

25 4. This Order terminates Docket no. 32.  
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IT IS SO ORDERED.

DATED: 3/16/2011



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CLAUDIA WILKEN

United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LEONARD A HASKINS,

Case Number: CV08-02226 CW

Plaintiff,

**CERTIFICATE OF SERVICE**

v.

ROBERT AYERS JR et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 16, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Leonard A. Haskins  
800 Main St., Apt. #207  
Redwood City, CA 94063

Dated: March 16, 2011

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk